IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
Houston Division

In Re ENRON CORPORATION SECURITIES, DERIVATIVE & "ERISA" LITIGATION,	MDL 1446
MARK NEWBY, ET AL., Plaintiffs, vs. ENRON CORPORATION, ET AL., Defendants.	CIVIL ACTION NO. H-01-3624 AND CONSOLIDATED CASES
PAMELA M. TITTLE, on behalf of herself and a class of persons similarly situated, ET AL., Plaintiffs, vs. ENRON CORP., an Oregon Corporation, ET AL., Defendants.	CIVIL ACTION NO. H-01-3913
KEVIN LAMKIN, JANICE SCHUETTE, ROBERT FERRELL, AND STEPHEN MILLER, Individually and on Behalf of All Others Similarly Situated, Plaintiffs, vs. UBS PAINEWEBBER, INC. AND UBS WARBURG, LLC, Defendants.	CIVIL ACTION NO. H-02-0851

MEMORANDUM IN SUPPORT OF AGREED MOTION OF *LAMKIN* DEFENDANTS OBJECTING TO, AND MOVING FOR RECONSIDERATION OF, THE COURT'S CONSOLIDATION ORDER OF NOVEMBER 22, 2002

UBS PaineWebber Inc. ("PaineWebber") and UBS Warburg ("Warburg"), defendants in *Lamkin, et al.* v. *UBS PaineWebber Inc., et al.*, No. H-02-851 (the "Lamkin Defendants"), file this Memorandum in Support of their Objection to, and Motion for Reconsideration of, the Court's Order dated November 22, 2002 consolidating this matter into H-01-3624, *Newby* v. *Enron Corp., et al.* ("*Newby*") and H-01-3913, *Tittle* v. *Enron Corp., et al.* ("*Tittle*") (the "Consolidation Order").[2]

[2] Plaintiffs are filing a similar motion. The *Lamkin* Defendants object only to consolidation and raise no objection to the transfer of this matter from Judge Gilmore to Judge Harmon.

PARTIES AND PROCEDURAL BACKGROUND IN *LAMKIN*

In *Lamkin*, four individuals (the "Plaintiffs") have brought an action against PaineWebber and Warburg. PaineWebber provides brokerage services and Warburg is an investment banking firm that provides analysis and research opinions. Lamkin Complaint ¶ 15. PaineWebber and Warburg are separate, affiliated divisions of their ultimate parent corporation, UBS AG.

Plaintiffs allege that Warburg's research analyst report regarding Enron stock, which contained a "strong buy," *i.e.*, a recommendation that PaineWebber repeated to its clients, provides the basis for securities fraud claims under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b) ("1934 Act"), and Rule 10b-5, 17 C.F.R. § 240.10b-5, promulgated thereunder (the "Rule 10b-5 claims"). Plaintiffs also allege that PaineWebber's role as a third-party administrator of Enron's employee stock option plan subjects PaineWebber to liability with regard to the research recommendation as an underwriter and/or seller of securities under Sections 11 and 12(2) of the Securities Act of 1933, 15 U.S.C. §§ 77k, 77l(2). Plaintiffs seek to represent shareholders who "owned, held, sold and/or acquired" Enron's securities between October 2, 2000 and December 2, 2001, through "private client and/or margin accounts administered by PaineWebber." Complaint ¶ 10.

The *Lamkin* case commenced on March 7, 2002, more than eight months before the Consolidation Order. The case originally was assigned to Judge Ewing Werlein, Jr. In July 2002, Judge Werlein recused himself, and the case was transferred to Judge Vanessa Gilmore.

Plaintiffs filed, but did not serve, an initial Complaint on March 7, 2002, and then filed and served a First Amended Complaint on April 18, 2002. On May 21, 2002, Defendants filed a Motion to Dismiss the First Amended Complaint along with a Memorandum of Law in

support of that motion. Plaintiffs sought to amend their complaint again, and on July 12, 2002, the Court entered an Order that permitted the filing of the Second Amended Complaint and set a schedule for the briefing of a new motion to dismiss. Pursuant to this Order, Defendants filed a Motion to Dismiss the Second Amended Complaint on August 15, 2002. Opposition and reply briefs were filed, pursuant to the schedule established by the Court's Order, and briefing was completed on November 15, 2002.

On October 28, 2002, the Court entered an order, *inter alia*, scheduling pre-certification class discovery and class certification briefing. Plaintiffs also filed a motion to appoint lead plaintiffs and lead counsel. On November 14, 2002, the parties participated in a teleconference hearing on the motion to appoint lead plaintiffs. On November 21, 2002, the Court granted the motion, appointing Kevin Lamkin, Janice Schuette, Robert Ferrell, and Stephen Miller lead plaintiffs for the putative class, and appointing the Provost * Umphrey Law Firm as lead counsel for the putative class.

Without any advance notice to the parties, on or around November 22, 2002 , the *Lamkin* matter was reassigned to Judge Melinda Harmon, and by Order of Judge Harmon of November 22, 2002, this case was ordered "consolidated into" *Newby* and *Tittle.*

For reasons described more fully below, the Lamkin Defendants object and respectfully request that the Court reconsider the Consolidation Order because consolidating this case with the *Newby* and *Tittle* matters will cause prejudice to the Lamkin Defendants, and this case is not otherwise appropriate for consolidation because of the substantial distinctions in the relevant facts and law.

ARGUMENT

I. Legal Standard Governing Consolidation

Consolidation pursuant to Fed. R. Civ. P. 42 is not proper where the consolidation order "would prejudice the rights" of any party. *St. Bernard Gen. Hosp., Inc.* v. *Hosp. Serv. Ass'n*, 712 F.2d 978, 989 (5th Cir. 1983); *see also Dupont* v. *Southern Pacific Co.*, 366 F.2d 193, 196 (5th Cir. 1966) (holding that a judge considering consolidation must "be most cautious" with regard to potential "prejudice" resulting from a consolidation order, noting that failure to do so is reversible error). Moreover, consolidation pursuant to Rule 42 is not justified solely on the basis that the actions may include some overlapping questions of fact or law. To the contrary, "when cases involve some common issues, but individual issues predominate, consolidation should be denied." *Lewis* v. *Intermedics Intraocular, Inc.*, No. Civ. A. 93-7, 1998 WL 139988, at *2 (E.D. La. Mar. 24, 1998) (attached); *see also In re Consol. Parlodel Litig.*, 182 F.R.D. 441, 445 (D. N.J. 1998) (same). In securities cases, consolidation may be considered only where there is "more than one action on behalf of a class asserting substantially the same claim or claims." 15 U.S.C. § 78u-4(a)(3)(B)(ii) (emphasis added).

Before a court can order consolidation, the court must assess "[w]hether the specific risks of prejudice and possible confusion [are] overborne by the risk of inconsistent adjudications of common factual and legal issues, the burden on parties, witnesses and available judicial resources posed by multiple lawsuits, the length of time required to conclude multiple suits as against a single one, and the relative expense to all concerned of the single- trial, multiple-trial alternatives." *Cantrell* v. *GAF Corp.*, 999 F.2d 1007, 1011 (6th Cir. 1993) (quotations omitted). "The systemic urge to aggregate litigation must not be allowed to trump our dedication to individual justice, and we must take care that each

individual plaintiff's – and defendant's – cause not be lost in the shadow of a towering mass litigation." *Malcolm* v. *Nat'l Gypsum Co.*, 995 F.2d 346, 350 (2d Cir. 1993) (quoting *In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831, 853 (2d Cir. 1992)). "Care must be taken that consolidation does not result in unavoidable prejudice or unfair advantage. Conservation of judicial resources is a laudable goal. However, if the savings to the judicial system are slight, the risk of prejudice to a party must be viewed with even greater scrutiny." *Cantrell*, 999 F.2d at 1011.

As explained below, in this matter, the factors all weigh decisively against consolidation. The Lamkin Defendants would be prejudiced, and the savings would be slight when compared to the confusion and burdens imposed on the *Lamkin* parties by "the shadow of a towering mass litigation."

II. The Consolidation Order, Coming After Substantial Activity In The *Lamkin* Case and in the Consolidated Proceedings, Would Cause Prejudice To The *Lamkin* Parties.

As noted, *Lamkin* has been pending since March 7, 2002. Defendants' motion to dismiss has been fully briefed and is ready for adjudication now. Throughout the eight months that the case has been pending, the parties never had any indication that the case would be considered for consolidation into the *Newby* and *Tittle* cases. To the contrary, the various scheduling orders that the Court entered and the progress of the litigation from March 7, 2002 through November 22, 2002 led the Lamkin Defendants to believe that the matter would proceed as a separate case. Indeed, the parties have expended substantial time and resources to twice brief motions to dismiss, an effort that could have been avoided if the possibility of consolidation had arisen earlier.

Further, given that the motion to dismiss in *Lamkin* is fully briefed, consolidation will bring the progress of *Lamkin* to a grinding halt at the very moment a dispositive motion was

ready for the Court's consideration. Consolidation is simply not appropriate when, as here, "consolidation will cause delay in the processing of one or more of the individual cases." 9 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2383 (2d ed. 1995); *see also Henderson* v. *National R.R. Passenger Corp.*, 118 F.R.D. 440, 441 (N.D. Ill. 1987) (rejecting consolidation when it would cause a litigant to "suffer unnecessary delay"). Moreover, consolidation would appear to render moot the substantial efforts of the *Lamkin* parties in preparing the motion to dismiss briefing.

The eight-month delay in consolidating *Lamkin* into *Tittle* also deprived the Lamkin Defendants of any opportunity to participate in class discovery or class certification briefing. This discovery and briefing is now closed in *Tittle*. The parties in *Lamkin* likewise have been deprived of an opportunity to participate in other potentially significant decisions and proceedings in the consolidated cases. *See, e.g.*, Feb. 7, 2002 Order of the Court in *Tittle* (providing for the commencement of certain discovery).[3]

III. There Is Insufficient Overlap of Legal or Factual Issues To Justify Consolidation.

A comparison of the *Lamkin* complaint to the *Newby* and *Tittle* complaints reveals that there is insufficient material overlap in either the factual or legal issues to justify consolidation under Fed. R. Civ. P. 42. The complaint in *Newby* essentially alleges material misstatements and omissions in Enron public statements and SEC filings and, in particular, the use of off-balance-sheet "special purpose entities" that allegedly enabled Enron to misrepresent the true financial condition of the company, including the existence of liabilities, in the public statements and SEC filings. *See Newby* Complaint ¶¶ 4, 21-35. The *Newby*

[3] Given the lack of overlapping legal or factual issues, as described below, the parties in *Lamkin* cannot be assured that the existing parties in *Newby* and *Tittle* have adequately represented and protected their distinct interests during these proceedings.

Complaint is brought against those individuals and entities that allegedly had some connection to the challenged statements and filings, and to the establishment of the special purpose entities.

There is no allegation in *Lamkin* that either PaineWebber or Warburg had anything to do with the allegations, statements or omissions, or the special purpose entities at issue in *Newby*. Neither PaineWebber nor Warburg issued Enron's financial statements, audited Enron's financial statements, issued or were involved with Enron's press releases, or were involved with the special purpose entities that are at the core of the *Newby* complaint. For example, Plaintiffs in *Newby* allege that certain financial institutions created, financed, and structured the special-purpose entities that are at the core of the *Newby* complaint. *See Newby* Complaint ¶¶ 4, 647, 652-799. But there is no allegation, nor could there be, in the *Lamkin* Complaint that either PaineWebber or Warburg had any involvement in establishing those special purpose entities.

The contrast between *Lamkin* and the consolidated ERISA case, *Tittle*, likewise shows an insufficient overlap of factual and/or legal issues for purposes of Fed. R. Civ. P. 42. In *Tittle*, a factually distinct putative class[4] alleges that defendants violated fiduciary duties imposed by the ERISA statute. *See Tittle* Complaint ¶¶ 738-86. This is an entirely different legal theory than that pursued in *Lamkin*, where Plaintiffs allege that PaineWebber's role as a third party administrator of an employee stock option plan renders PaineWebber an "underwriter" and/or "seller" for purposes of liability under Section 11 and/or Section 12 of

[4] To be a member of the Plaintiff class in *Tittle*, the employee must be a "participant" in either the "Enron Corp. Stock Ownership Plan," the "Cash Balance Plan," the "Enron Corp. Savings Plan," or have received grants of "phantom stock" from Enron. *Tittle* Complaint ¶ 1. In contrast, the putative class in *Lamkin* includes only those employees who participated in the Enron stock option plan or owned, held, sold, and/or acquired Enron stock through a PaineWebber account. *Lamkin* Complaint ¶ 10.

the 1933 Securities Act. The allegations have nothing to do with fiduciary duties imposed by ERISA. These legal theories not only fail to overlap, but pursuit of these distinct theories against different defendants in the same proceeding would cause confusion, particularly at trial.

Most importantly, neither the *Newby* nor *Tittle* plaintiffs challenge the statements and actions that lie at the core of all the claims in *Lamkin*. "In securities actions where the complaints are based on the same public statements and reports consolidation is appropriate if there are common questions of law and fact and the defendants will not be prejudiced." *Internet Law Library, Inc.* v. *Southridge Capital Mgmt., LLC*, 208 F.R.D. 59, 61 (S.D.N.Y. 2002) (emphasis added, citations omitted). Here, however, the Warburg analyst opinion that underlies the federal securities law claim in *Lamkin* is not challenged in *Newby* and *Tittle*.[5] Indeed, PaineWebber and Warburg are not defendants in either *Newby* or *Tittle*.

Where, as here, there is no substantial overlap in either the factual or legal issues, consolidation is not appropriate. Recognizing that principle, in a recent decision in the litigation concerning Worldcom, the court declined to consolidate a case similar to *Lamkin*, centered on a research analyst's recommendation, with the larger case involving the alleged misrepresentations of WorldCom itself and the officers, directors, and auditors, because the "the factual and legal issues [in the two suits] are likely to be largely distinct." *In re WorldCom, Inc., Sec. & "ERISA" Litig.*, No. 1487, 2002 WL 31300772, at *2 (Jud. Pan. Mult. Litig. Oct. 08, 2002) (attached). The same result is appropriate here.

The lack of common factual and legal issues means that the practical and equitable benefits that underlie consolidation are absent here. Allowing the *Lamkin* matter to proceed

[5] The consolidated complaints in *Newby* and *Tittle* were filed *after* the *Lamkin* complaint was filed.

as a separate case would not lead to duplicative discovery. For example, many of the key witnesses in the *Newby/Tittle* matter would not be able to offer testimony relevant to the claims and defenses in *Lamkin*, including the former Enron employees who were involved in: (1) the financing/structuring of Enron's special purpose entities; (2) the creation of Enron's financial statements; and (3) Enron's auditing process. Similarly, the witnesses of greatest relevance to the claims in *Lamkin* are unlikely to be of any interest to the other parties in *Newby* and *Tittle*.

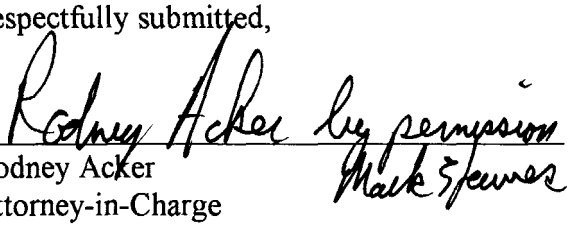
Furthermore, consolidation would impose substantial additional burdens on the Lamkin Defendants who would be required after consolidation to monitor a much larger case and participate in proceedings that would have little, if anything, to do with them. Accordingly, the burdens of consolidation here vastly outweigh any possible efficiencies. *See Cantwell*, 999 F.2d at 1011.

CONCLUSION

The Lamkin Defendants respectfully request that the Court reconsider its order of November 22, 2002, consolidating the *Lamkin* matter into the *Newby* and *Tittle* matters, and vacate that order, allowing *Lamkin* to proceed as a separate case in this Court.

December 6, 2002

Respectfully submitted,



Rodney Acker
Attorney-in-Charge
S.D. No. 13408
JENKENS & GILCHRIST
A Professional Corporation
1445 Ross Avenue, Suite 3200
Dallas, Texas 75202
Telephone: (214) 855-4500
Facsimile: (214) 855-4300

ATTORNEYS FOR DEFENDANTS
UBS PAINEWEBBER INC. AND
UBS WARBURG, LLC

Of Counsel:

John Gilliam
State Bar No. 079838000
Ellen B. Sessions
State Bar No. 00796282
JENKENS & GILCHRIST
A Professional Corporation
1445 Ross Avenue, Suite 3200
Dallas, Texas 75202
Telephone: (214) 855-4500
Facsimile: (214) 855-4300

Geoffrey F. Aronow
Randall K. Miller
ARNOLD & PORTER
555 12th Street, N.W.
Washington, D.C. 20004
Telephone: (202) 942-5000
Facsimile: (202) 942-5999

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this pleading was served on all known counsel of record on December 6, 2002 via posting to www.esl3624.com in compliance with the Court's Order Regarding Service of Papers and Notice of Hearings Via Independent Website.

Walter Umphrey
Michael A. Havard
Provost * Umphrey Law Firm
490 Park Street
P.O. Box 4905
Beaumont, Texas 77704
(409) 835-6000; fax (409) 838-8803

Bonnie E. Spencer
Spencer & Associates
Pan Jackson Building
4041 Richmond Ave.
5th Floor
Houston, Texas 77027
(713) 461-7770; fax (713) 961-5336

Andy Tindel
Provost * Umphrey Law Firm
304 West Rusk Street
Tyler, Texas 75701
(903) 596-0900; (fax) (903) 596-0909

Joe Kendell
Provost * Umphrey Law Firm
2214 Main Street
Dallas, Texas 75201
(214) 744-3000; fax (214) 961-5336

Rodney Acker by Permission Mark Hanna

Rodney Acker

2002 WL 31300772
--- F.Supp.2d ----
(Cite as: 2002 WL 31300772 (Jud.Pan.Mult.Lit.))

Judicial Panel on Multidistrict Litigation.

In re WORLDCOM, INC., SECURITIES & "ERISA" LITIGATION.

No. 1487.

Oct. 8, 2002.

Various parties moved to consolidate and centralize for pretrial proceedings 42 actions against telecommunications corporation. The Judicial Panel on Multidistrict Litigation, John F. Keenan, Acting Chairman, held that: (1) consolidation and centralization of 39 actions alleging misrepresentations or omissions concerning corporation's financial condition and accounting practices was warranted; (2) consolidation and centralization of three actions distinct from other 39 was not warranted; and (3) transfer of consolidated actions to Southern District of New York was appropriate.

Motions granted in part and denied in part.

West Headnotes

[1] Federal Civil Procedure k9
170Ak9
Proceedings.

Consolidation and centralization for pretrial proceedings of 39 actions was warranted in multidistrict litigation against telecommunications corporation alleging misrepresentations or omissions concerning its financial condition and accounting practices; all actions focused on significant number of common events, defendants, and witnesses, and centralization was necessary to eliminate duplicative discovery, prevent inconsistent pretrial rulings, and conserve resources of parties, their counsel, and judiciary. 28 U.S.C.A. § 1407.

[2] Federal Civil Procedure k9
170Ak9

Transfer of all related actions in multidistrict litigation to single judge has streamlining effect of fostering pretrial program that: (1) allows pretrial proceedings with respect to any non-common issues to proceed concurrently with pretrial proceedings on common issues, and (2) ensures that pretrial proceedings will be conducted in manner leading to just and expeditious resolution of all actions to overall benefit of parties. 28 U.S.C.A. § 1407.

[3] Federal Civil Procedure k9
170Ak9

Consolidation and centralization for pretrial proceedings of three actions in multidistrict litigation against telecommunications corporation bearing no relation to, or distinct from, actions focusing on alleged accounting and other financial irregularities was not warranted; centralization would neither have served convenience of parties and witnesses nor furthered just and efficient conduct of litigation. 28 U.S.C.A. § 1407.

[4] Federal Courts k156
170Bk156

Transfer to Southern District of New York of 39 actions against telecommunications corporation alleging misrepresentations or omissions concerning its financial condition and accounting practices, consolidated for pretrial proceedings, was appropriate; district was one of several locations likely to be source of documents and witnesses relevant to litigation, constituent actions in district had already been coordinated or consolidated before single judge, district was venue for other important legal proceedings involving corporation, including corporation's bankruptcy case, and litigation of such scope benefitted from centralization in major metropolitan center.

BeFORE: WM. TERRELL HODGES, [FN*] Chairman, JOHN F. KEENAN, MOREY L. SEAR,* BRUCE M. SELYA, JULIA SMITH GIBBONS, D. LOWELL JENSEN * and J. FREDERICK MOTZ, Judges of the Panel.

TRANSFER ORDER

***1** Now before the Panel are three motions for centralization, pursuant to 28 U.S.C. § 1407, collectively encompassing 42 actions listed on the attached Schedules A and B and pending in five districts as follows: 26 actions in the Southern District of New York, twelve actions in the Southern District of Mississippi, two actions in the Southern District of Florida, and one action each in the Northern District of California and the District of District of Columbia. Movants are i) plaintiffs in the District of District of Columbia action, ii) plaintiff in one of the Southern District of Mississippi actions (*Slater*), and iii) twelve directors of WorldCom, Inc. (WorldCom). There is general agreement that some form of Section 1407 centralization is appropriate in this docket arising from the collapse of WorldCom. Disagreement exists concerning i) whether actions brought under the Employee Retirement Income Security Act of 1974 (ERISA) should be centralized in a separate MDL docket, ii) whether actions relating to the issuance of analyst reports recommending purchase of WorldCom stock should be included in this docket, and iii) the selection of transferee forum--suggested districts are the Southern District of Mississippi, the Southern District of New York, the Northern District of California, and the District of District of Columbia.

[1][2] On the basis of the papers filed and hearing session held, the Panel finds that the actions in this litigation listed on Schedule A involve common questions of fact and that their centralization in the Southern District of New York will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation. The Schedule A actions share factual questions arising out of alleged misrepresentations or omissions concerning WorldCom's financial condition and accounting practices. Whether the actions be brought by securities holders seeking relief under the federal securities laws, shareholders suing derivatively on behalf of WorldCom, or participants in retirement savings plans suing for violations of ERISA, all Schedule A actions can be expected to focus on a significant number of common events, defendants, and/or witnesses. Centralization under Section 1407 is necessary in order to eliminate duplicative discovery, prevent inconsistent pretrial rulings (especially with respect to questions of class certification), and conserve the resources of the parties, their counsel and the judiciary. *See In re Enron Corp. Securities, Derivative & "ERISA" Litigation,* 196 F.Supp.2d 1375 (Jud.Pan.Mult.Lit.2002). Plaintiffs in the California and District of Columbia actions have opposed centralization of the federal securities actions and ERISA actions in a single MDL docket and have instead

suggested that the eleven ERISA actions now before the Panel be centralized separately in the Northern District of California (the choice of the California plaintiffs) or the District of District of Columbia (the choice of the District of Columbia plaintiffs). We agree with all other parties that have addressed this issue (including the plaintiffs in the nine other ERISA actions now before the Panel) that such a dichotomy is unwarranted. We point out that transfer of all related actions to a single judge has the streamlining effect of fostering a pretrial program that: i) allows pretrial proceedings with respect to any non-common issues to proceed concurrently with pretrial proceedings on common issues, *In re Multi-Piece Rim Products Liability Litigation,* 464 F.Supp. 969, 974 (Jud.Pan.Mult.Lit.1979); and ii) ensures that pretrial proceedings will be conducted in a manner leading to the just and expeditious resolution of all actions to the overall benefit of the parties. Any concerns of the objecting ERISA plaintiffs that Section 1407 centralization will somehow retard the pace at which their claims are prosecuted should be addressed to the transferee judge, who remains free to establish separate tracks for discovery and motion practice in any constituent MDL-1487 action or actions, whenever she concludes that such an approach is appropriate.

***2** [3] On the basis of the papers filed and hearing session held, the Panel further finds that Section 1407 centralization of the actions listed on Schedule B would neither serve the convenience of the parties and witnesses nor further the just and efficient conduct of this litigation. One of those actions (*Guest*), which was included on the Mississippi plaintiff's motion, is brought solely against WorldCom for a breach of contract arising from a four day interruption of telephone service. It thus bears no relation to actions focusing on alleged accounting and other financial irregularities at WorldCom.

The other two Schedule B actions (*Garner* and *Spangler*) were included on the WorldCom directors' motion, although those movants have since sought leave to withdraw their Section 1407 centralization request with respect to the two actions. The recently appointed lead plaintiff in the consolidated Southern District of New York securities action, however, continues to support inclusion of *Garner* and *Spangler* in MDL-1487. Although also brought under the federal securities laws as class actions, *Garner* and *Spangler* differ from the other MDL-1487 securities actions in that they do not name WorldCom, any WorldCom officer or director, or WorldCom's auditor as defendants. Instead, plaintiffs sue investment analyst Jack Grubman and his ex-employer, Salomon Smith Barney, Inc. (Salomon), on behalf of persons who purchased WorldCom stock as a result of alleged misrepresentations and omissions occurring in connection with defendants' issuance of reports recommending purchases of WorldCom stock. While there may indeed be some overlap between these "analyst" actions and the other MDL-1487 actions, we are persuaded that the factual and legal issues in the other MDL-1487 actions are likely to be largely distinct from issues regarding the conduct of an equity research analyst that are at the heart of *Garner* and *Spangler.* In this regard, we note that within the Southern District of New York *Garner* and *Spangler* are part of a group of other actions against Mr. Grubman and Salomon (regarding issuance of research reports for WorldCom and certain other fallen companies) that have been consolidated before a judge other than the judge to whom the WorldCom securities, derivative and ERISA actions have been assigned. Inclusion of *Garner* and *Spangler* in MDL-1487 would

disrupt this structure already established in the transferee district. Finally, we note that to the extent any coordination between the "analyst" actions and the MDL-1487 actions becomes desirable, the involved judges within the transferee district may address that matter in an appropriate fashion on their own.

[4] We are persuaded that an appropriate transferee forum for centralized pretrial proceedings in this litigation is the Southern District of New York. We note that i) the New York area is one of several locations likely to be a source of documents and witnesses relevant to this litigation; ii) the constituent New York actions have already been coordinated or consolidated before a single judge in that district and are proceeding apace; iii) the Southern District of New York is also the venue for other important WorldCom legal proceedings (including Worldcom's bankruptcy case, a civil suit by the Securities and Exchange Commission, criminal complaints brought by the United States, and the "analyst" actions involving Salomon and Mr. Grubman); and iv) a litigation of this scope will benefit from centralization in a major metropolitan center that is well served by major airlines, provides ample hotel and office accommodations, and offers a well developed support system for legal services.

***3** IT IS THEREFORE ORDERED that, pursuant to 28 U.S.C. § 1407, the actions listed on the attached Schedule A and pending outside the Southern District of New York are transferred to the Southern District of New York and, with the consent of that court, assigned to the Honorable Denise Cote for coordinated or consolidated pretrial proceedings with the actions pending in that district and listed on Schedule A.

IT IS FURTHER ORDERED that, pursuant to 28 U.S.C. § 1407, transfer is denied with respect to the actions listed on the attached Schedule B.

SCHEDULE A

MDL-1487--In re WorldCom, Inc., Securities & "ERISA" Litigation

Northern District of California
Stephen Vivien, et al. v. WorldCom, Inc., et al., C.A. No. 3:02-1329

District of District of Columbia
Patrick Emanuele, et al. v. WorldCom, Inc., et al., C.A. No. 1:02-1353

Southern District of Florida
Kim Y. Bracey v. WorldCom, Inc., et al., C.A. No. 9:02-80561
Paula K. Hobson v. WorldCom, Inc, et al., C.A. No. 9:02-80602

Southern District of Mississippi
Jeremy Oran, et al. v. WorldCom, Inc., et al., C.A. No. 3:02-484
Judy Wilson Rambo, et al. v. WorldCom, Inc., et al., C.A. No. 3:02-1088
Kenneth Z. Slater, etc. v. WorldCom, Inc., et al., C.A. No. 3:02-1092
William Goldstein v. Bernard J. Ebbers, et al., C.A. No. 3:02-1141
Genotra Cornish v. WorldCom, Inc., et al., C.A. No. 3:02-1144
Wendell C. Williams v. WorldCom, Inc., et al., C.A. No. 3:02-1145
Ghita Levine v. WorldCom Corp., et al., C.A. No. 3:02-1146
Sherman Oliver v. WorldCom, Inc., et al., C.A. No. 3:02-1150
Estinika McGlothin v. WorldCom, Inc., et al., C.A. No. 3:02-1151
James R. Mueller, et al. v. WorldCom, Inc., et al., C.A. No. 3:02-1156
Tina Langley Lyons v. WorldCom, Inc., et al., C.A. No. 3:02-1158
Pacific Income Advisors, Inc. v. WorldCom,

Inc., et al., C.A. No. 3:02- 1168

Southern District of New York
In re WorldCom, Inc. Securities Litigation, C.A. No. 1:02-3288
Michael Bamdis v. WorldCom, Inc., et al., C.A. No. 1:02-3416
Brian Barry v. WorldCom, Inc., et al., C.A. No. 1:02-3419
Beverly Schreck, et al. v. WorldCom, Inc., et al., C.A. No. 1:02-3508
David Crum v. WorldCom, Inc., et al., C.A. No. 1:02-3537
David Kramer v. WorldCom, Inc., et al., C.A. No. 1:02-3647
Steven Brakl v. WorldCom, Inc., et al., C.A. No. 1:02-3750
Davon Group, Ltd. v. WorldCom, Inc., et al., C.A. No. 1:02-3771
Robin Hodes Jacobs, etc. v. WorldCom, Inc., et al., C.A. No. 1:02-4719
Gail M. Grenier, et al. v. WorldCom, Inc., et al., C.A. No. 1:02-4816
Shereen Beydoun v. WorldCom Group, Inc., et al., C.A. No. 1:02-4945
Eric Edwards, et al. v. WorldCom, Inc., et al., C.A. No. 1:02-4946
Maurice Brodsky v. WorldCom, Inc., et al., C.A. No. 1:02-4958
Nicholas Federicka, et al. v. WorldCom, Inc., et al., C.A. No. 1:02-4973
***4** *Above Paradise Investments, Ltd. v. WorldCom, Inc., et al.*, C.A. No. 1:02-4990
Frank D. Seinfeld v. James C. Allen, et al., C.A. No. 1:02-5018
Ronnie Ribnick v. WorldCom, Inc., et al., C.A. No. 1:02-5057
Robert D. Jaffee Revocable Trust v. WorldCom, Inc., et al., C.A. No. 1:02- 5071
Gary Ginsburg v. WorldCom, Inc., et al., C.A. No. 1:02-5087
Jeffrey R. Applebaum v. WorldCom, Inc., et al., C.A. No. 1:02-5108
John T. Alexander v. WorldCom, Inc., et al., C.A. No. 1:02-5140
Robert Weiss v. WorldCom, Inc., et al., C.A. No. 1:02-5224
Municipal Police Employees Retirement System of Louisiana v. WorldCom, Inc., et al., C.A. No. 1:02-5285

SCHEDULE B

MDL-1487--In re WorldCom, Inc., Securities & "ERISA" Litigation

Southern District of New York
B.R. Guest, Inc. v. WorldCom, Inc., C.A. No. 1:02-2775
James R. Garner v. Salomon Smith Barney, Inc., et al., C.A. No. 1:02-4038
Marjorie Spangler v. Salomon Smith Barney, Inc., et al., C.A. No. 1:02- 4087

FN* Judges Hodges, Sear and Jensen took no part in the decision of this matter.

--- F.Supp.2d ----, 2002 WL 31300772 (Jud.Pan.Mult.Lit.)

END OF DOCUMENT

1998 WL 139988
(Cite as: 1998 WL 139988 (E.D.La.))

Only the Westlaw citation is currently available.

United States District Court, E.D. Louisiana.

Edward A. LEWIS
v.
INTERMEDICS INTRAOCULAR, INC.

No. Civ.A. 93-7.

March 24, 1998.

ORDER AND REASONS

PORTEOUS, J.

***1** Before the Court is plaintiffs' Motion To Amend and/or Vacate Order of Consolidation. Plaintiffs also request that the Court bifurcate liability from damages for trial. Defendants have submitted a memorandum in opposition to the motion. Oral argument was heard on March 18, 1998, and the matter was taken under submission. After reviewing the parties arguments and the relevant law, the Court GRANTS plaintiffs' motion to consolidate the cases for all aspects of the litigation and orders that liability and damages be tried separately.

PROCEDURAL BACKGROUND

On June 1, 1993, Judge Livaudais consolidated the five cases for all purposes. The case was transferred to Judge Heebe and on September 15, 1993, he amended Judge Livaudais' order and consolidated the cases for pre-trial purposes only. It is worth noting a passage in the order:

> "This Court consulted with all of the interested parties ... All parties agree that the above-captioned cases should be consolidated for pre-trial motions, discovery and other applicable cut-off dates; the parties also agree that the cases should be tried separately."

Plaintiff's Motion to Amend, Exhibit B.

The five cases were ultimately dismissed on preemption grounds and plaintiffs' appeal was stayed by the Fifth Circuit pending the Supreme Court's ruling in *Lohr*. After that ruling the appellate court reversed in part and vacated in part the District Court's decision and remanded the case for further proceedings.

Plaintiffs now want to consolidate for *all* purposes (pre-trial and trial) the five cases concerning whether or not defendant's lenses were responsible for plaintiffs' injuries.

LAW AND ARGUMENT

Plaintiffs argue that the five cases share common issues of law and fact which warrant consolidation pursuant to FRCP 41(a).

Each case involves the same product (the Model 44 B Lens) manufactured by the same defendant. Each injury resulted from implanting the lens in the plaintiffs' eyes. Each case involves the same issue of liability which turns on Intermedics' alleged failure to comply with the FDA regulations governing testing of an experimental product.

Defendant maintains that the agreement not to consolidate has been in place for four years and there is no reason shown by plaintiff why circumstances have so drastically changed that merit consolidation.

Defendant also claims that consolidation will be extremely prejudicial because these are five completely different cases due to the unique nature of each plaintiff's condition and injuries. They also allege that the separate claims cover a number of different ailments for which there may be other possible causes other than the Intermedics lens. Defendant offers the following examples of the differences in the case.

According to the doctor of Plaintiff Lewis, who has had ten operations, his blindness is due to glaucoma. Plaintiff Ferrara also has glaucoma and defendant argue that his eyes were already extensively damaged before implementation. He also had another type of lens and is suing that manufacturer. Angelle is also involved in litigation with another lens manufacturer and his claimed injury is excessive tearing and pain. Caronia's vision allegedly deteriorated when he fell down which may have dislocated the lens. Bordenave says he has not been blinded by the lens but his vision is limited.

***2** Defendant argues that plaintiffs received their respective lenses at different times and there may have been changes in the manufacturing of each particular lens or in the warnings provided with the lenses. If tried together there will be testimony from at least 30 doctors.

Defendant also argues that if the cases were consolidated, the evidence of one claim, which would otherwise be inadmissible, could come into evidence on another claim. Therefore, there is a risk that a jury could find in favor of all plaintiffs on the issue of liability because of a stronger case made by one of the plaintiffs. This jury confusion would be prejudicial to defendant.

LAW AND ARGUMENT

Consolidation:

Courts have broad discretion on whether or not to consolidate where there are common questions of law and fact and where consolidation would save time and money. *Mills v. Beech Aircraft Corp.*, 886 F.2d 758, 761-62 (5th Cir.1989). As Wright and Miller point out: "[I]t is for the court to weigh the saving of time and effort that consolidation would produce against any inconvenience, delay, or expense that it would cause." 9 Wright Miller, FEDERAL PRACTICE AND PROCEDURE, § 2383 at 439 (2nd ed.1995).

Defendant points to *Hasman v. G.D. Searle & Co.*, 106 F.R.D. 459, (E.D.Mich.1985) for support. The *Hasman* Court denied a motion to consolidate three cases concerning injuries from IUD devices. The Court ruled in its 3-page opinion: "The three Cases involve separate and unique medical, social, and sexual histories peculiar to each woman and her sexual partners." *Id.* at 460. The differences cited by the *Hasman* Court were: different warnings, different warranties and perhaps defects, and different inserting physicians. The Court held that when cases involve some common issues but individual issues predominate, consolidation should be denied. *Id. citing Molever v. Levenson,* 539 F.2d 996 (4th Cir.1976, *cert. denied* 429 U.S. 1024, 97 S.Ct. 643, 50 L.Ed.2d 625 (1976).

Plaintiffs rely on *Kershaw v. Sterling Drug, Inc.*, 415 F.2d 1009 (5th Cir.1969). In *Kershaw,* two cases, concerning the drug Alaren which caused deterioration of the

retina, were consolidated. One issue on appeal was whether the court erred in consolidating the cases because one plaintiff had more extensive injuries than the others.

The *Kershaw* court held that consolidation was proper noting that:

> The common questions of fact in this case included the causation of chloroquine retinopathy, Sterling's knowledge of the disease, and the nature of its warnings. Common questions of law were presented on Sterling's duty and the reasonableness of its warnings.

Id. at 1012.

The *Kershaw* Court was also satisfied that the trial judge sufficiently emphasized the importance of separating the Kershaw case and the companion case for the jury's consideration. *Kershaw* appears to be more on point with the instant case than *Hasman* because the issue turns on a product and its effect and does not involve a third party such as a sexual partner.

***3** Plaintiffs also point to a Second Circuit decision which affirmed consolidation of four cases where similar illnesses were caused by a reaction to asbestos. *Consorti v. Armstrong World Indus. Inc.*, 72 F.3d 1003 (2nd Cir.1995). This Court agrees with the Second Circuit's reasoning that consolidation was fair because it allowed the jury to "scale the relative seriousness of the various plaintiffs' injuries." *Id.* at 1007. The Second Circuit also noted that it was useful to hear the issues repeated to gain a deeper understanding. These reasons seem especially applicable to the litigation at hand because of the different degrees of injury allegedly caused by one product.

The Court, thus persuaded by reasons of efficiency and fairness, orders that the five cases be consolidated for both pre-trial and trial proceedings.

Bifurcation:

Pursuant to Fed.R.Civ.P. 42(b), it is within the trial judge's discretion to bifurcate the trial ordering that liability and damages be tried separately. The major consideration is what will likely result in a just and expeditious disposition. Wright and Miller at 481.

Defendant offers no argument on this issue; their brief is completely centered on the consolidation issue. Plaintiffs' argument is that it is more efficient to present evidence of liability at the same time because if the jury finds no liability then there is no need to dwell on damages. In addition, bifurcation will be fair because each plaintiff will have to prove separately causation and damages. The Court agrees with this argument and orders that the trial be bifurcated, with liability to be tried first and if the jury finds liability, then damages will be tried.

Accordingly,

The Court GRANTS plaintiffs' motion to consolidate the five cases for all proceedings in this case and also orders that the trial be bifurcated, hearing liability first and if necessary, then damages.

1998 WL 139988, 1998 WL 139988 (E.D.La.)

END OF DOCUMENT